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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**At Charleston**

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**STATE OF WEST VIRGINIA *ex rel.*, MOUNTAINEER GAS COMPANY,**

***Petitioner,***

**v.**

**THE HONORABLE R. CRAIG TATTERSON, Judge of the Circuit Court of Roane  
County, West Virginia, THE ESTATE OF CORY COLTON KEITH CARPER, et al.,**

***Respondents,***

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***From the Circuit Court of  
Roane County, West Virginia  
Civil Action No. 19-C-9***

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**PETITION FOR WRIT OF PROHIBITION**

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## TABLE OF CONTENTS

<b>I. QUESTIONS PRESENTED .....</b>	<b>1</b>
<b>II. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>A. Statement of Facts.....</b>	<b>3</b>
1. MGC’s Service Territory, Distribution System, and the Carper’s House.....	3
2. West Virginia Policy Concerning Farm (Field) Tap Service .....	4
3. MGC Service to the Carpers’ House.....	6
<b>B. Carper House’s Customer Gas Supply, Incident Furnace, and Replacement.....</b>	<b>7</b>
1. There was no history of problems with the gas supply.....	7
2. Installation and Operation of the Incident Furnace .....	8
3. Replacement Furnace .....	11
<b>C. MGC Tariff Provisions.....</b>	<b>12</b>
<b>III. SUMMARY OF THE ARGUMENT .....</b>	<b>13</b>
<b>IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....</b>	<b>15</b>
<b>V. ARGUMENT .....</b>	<b>15</b>
<b>A. Standard for Writ of Prohibition .....</b>	<b>15</b>
<b>B. The Circuit Court’s Order is Clearly Erroneous as a Matter of Law. The PSC did not exceed its statutory authority by approving liability-limiting language in MGC’s Tariff.....</b>	<b>16</b>
1. Rules of Statutory Interpretation .....	16
2. The Legislature’s delegation of power is broad and without preference as to methods, as long as it safeguards the interests of the public and financial health of regulated utilities .....	17
<b>C. The Application of Tariff Limitations on Liability is a Significant Issue of First Impression that Impacts all West Virginia Public Utilities.....</b>	<b>20</b>
1. Historically, utility tariffs’ limitations on liability are enforced, which is consistent with West Virginia case law.....	20
2. Other gas utilities have tariff language that limits liability, with PSC approval. The Circuit Court’s Order has significant policy implications.....	22
3. Numerous jurisdictions apply utility tariff provisions that limit liability as written. ....	24
4. Decisions relied upon by the Circuit Court are readily distinguishable.....	26
5. The tariff provisions at issue do not conflict with “the laws of this state” and the Circuit Court did not actually consider the issue. ....	30

<b>D. The tariff provisions at issue are reasonable.....</b>	<b>35</b>
<b>VI. CONCLUSION .....</b>	<b>366</b>

## TABLE OF AUTHORITIES

### Cases

<i>Adams v. Northern Illinois Gas Co.</i> , 809 N.E.2d 1248 (Ill. 2004) .....	28, 29, 31
<i>Ark. La. Gas Co. v. Hall</i> , 453 U.S. 571, 101 S. Ct. 2925, 69 L.E.2d 856 (1981).....	21
<i>Barber v. Camden Clark Mem. Hosp. Corp.</i> , 240 W. Va. 663, 815 S.E.2d 474 (2018) .....	16, 19
<i>Bluefield Waterworks &amp; Imp. Co. v. Pub. Serv. Comm’n. of W. Va.</i> , 262 U.S. 679, 43 S. Ct. 675 (1923) .....	21
<i>Chesapeake &amp; Potomac Tel. Co. v. Morgantown</i> , 144 W. Va. 149, 107 S.E.2d 489 (1959).....	17
<i>City of S. Charleston v. W. Va. Pub. Serv. Comm’n</i> , 204 W.Va. 566, 514 S.E.2d 622 (1999) ....	17
<i>Coachlight Las Cruces, LTD. v. Mountain Bell Tel. Co.</i> , 664 P.2d 994 (N.M. App. 1983)... ..	24, 28
<i>Columbia Gas of W. Va., Inc. v. Pub. Serv. Comm’n of W.Va.</i> , 173 W.Va. 19, 311 S.E.2d 137 (1983) .....	17
<i>Danisco Ingredients USA, Inc. v. Kansas City Power &amp; Light Co.</i> , 986 P.2d 277 (Kan. 1999) .....	24, 27
<i>Danisco Ingredients USA, Inc. v. Kansas City Power &amp; Light Co.</i> , 999 S.W. 326 (Mo. App. 1999).....	27
<i>Del Carmen Canas v. Centerpoint Energy Resources Corp.</i> , 418 S.W.3d 312 (2013).....	24, 25
<i>E.J. Gallo Winery v. Encana Corp.</i> , 503 F.3d 1027 (9 <sup>th</sup> Cir. 2007) .....	22
<i>Eureka Pipe Line Co. v. Pub. Serv. Comm’n</i> , 148 W.Va. 674, 137 S.E.2d 200 (1965), .....	19, 20
<i>Gallivan v. AT&amp;T Corp.</i> , 124 Cal. App. 4th 1377, 21 Cal. Rptr. 3d 898 (2004).....	20
<i>Holt v. West Virginia-American Water Co.</i> 233 W.Va. 688, 760 S.E.2d 502 (2014) .....	18
<i>Houston Lighting &amp; Power Co. v. Auchan USA, Inc.</i> , 995 S.W.2d 668 (Tx. 1999).....	24, 25
<i>In re SDG&amp;E Consolidated Cases</i> , 2021 WL 662259 (S.D. Cal., Feb. 19, 2021) .....	30
<i>Maryland Cas. Co. v. NSTAR Elec. Co.</i> , 471 Mass. 416, 30 N.E.3d 105 (2015) .....	21, 22, 24
<i>Primrose v. W. Union Tel. Co.</i> , 154 U.S. 1, 14 S. Ct. 1098, 38 L.Ed. 883 (1984) .....	25
<i>Reed v. Smith Lumber Co.</i> , 165 W.Va. 415, 268 S.E.2d 70 (1980).....	31
<i>Sallee Horse Vans, Inc. v. Pessin</i> , 763 S.W.2d 149 (Ky. 1988) .....	17
<i>Sw. Elec. Power Co. v. Grant</i> , 73 S.W.3d 211 (Tx. 2002) .....	24, 25, 26
<i>Sw. Sugar &amp; Molasses Co. v. River Terminals Corp.</i> , 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed.2d 1334 (1959) .....	25
<i>Stand Energy Corp. v. Columbia Gas Transmission Corp.</i> , 373 F.Supp.2d 631 (S.D.W.Va. 2005) .....	22
<i>State ex rel. Bell Atlantic-West Virginia v. Ranson</i> , 201 W.Va. 402, 497 S.E.2d 755 (1997) .....	20
<i>State ex rel. Hoover v. Berger</i> , 199 W.Va. 12, 483 S.E.2d 12 (1996).....	15
<i>State ex rel. Knight v. Pub. Serv. Comm’n</i> , 161 W.Va. 447, 245 S.E.2d 144 (1978).....	21, 25
<i>State ex rel. State Auto Ins. Co. v. Risovich</i> , 204 W.Va. 87, 511 S.E.2d 498 (1998) .....	15
<i>State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell</i> , 226 W.Va. 138, 697 S.E.2d 730 (2010) .	16
<i>Thomas v. McDermitt</i> , 232 W.Va. 159, 751 S.E.2d 264 (2013).....	16
<i>United Fuel Gas Co. v. Pub. Serv. Comm’n</i> , 73 W.Va. 571, 80 S.E. 931 (1914) .....	17
<i>Verizon Virginia LLC v. XO Communications, LLC</i> , 144 F.Supp.3d 850 (E.D. Va. 2015) .....	17
<i>Va. Elec. &amp; Power Co. v. Pub. Serv. Comm’n</i> , 161 W.Va. 423, 242 S.E.2d 698 (1978).....	22, 23
<i>W. Union Tel. Co. v. Esteve Bros. &amp; Co.</i> , 256 U.S. 566, 41 S. Ct. 584 (1921) .....	21, 22

## Statutes

W.Va. Code § 24-1-1 .....	18, 33
W.Va. Code § 24-1-7 .....	30
W.Va. Code § 24-2-1 .....	20
W.Va. Code § 24-2-20 .....	33
W.Va. Code § 24-2-3 .....	17
W.Va. Code § 24-2-4a(b).....	17
W.Va. Code § 24-3-1 .....	30, 31, 34
W.Va. Code § 24-4-7 .....	20
W.Va. Code §§ 24-2-2 .....	18, 19, 33

## Regulations

W.Va. C.S.R. § 150-4-2.3.5 .....	34
W.Va. C.S.R. § 150-4-2.3.9 .....	33
W.Va. C.S.R. § 150-4-4.10 .....	30, 31, 33, 34
W.Va. C.S.R. § 150-4-5.4.4 .....	34
W.Va. C.S.R. § 150-4-7.2.1 .....	30, 31, 32, 33, 34
W.Va. C.S.R. § 151-4-2.1 .....	32

## Other Authorities

<u>General Investigation into the Continuation of Natural Gas Service to Field Tap Customers and Areas Supplied by and Dependent on Conventional Gas Production, Public Service Commission of West Virginia, Case No. 19-0467-G-GI (May 31, 2019) .....</u>	5
<u>General Investigation, upon the Commissions own motion, to Consider Proposals for Consumer Protections, Farm Taps, and Filing Requirements for Applications by Natural Gas Utilities Field Pursuant to W.Va. Code § 234-2-1k, Public Service Commission of West Virginia, Case No. 19-0004-G-GI (Jan. 3, 2019) .....</u>	5
<u>MGC Petition for consent to enter into an agreement with consumers who prospectively request gas service from a mainline tap, Public Service Commission of West Virginia, Case No. 92-0313-G-PC (June, 29, 1994) .....</u>	6
Peoples Gas WV LLC, Public Service Commission of West Virginia, Case No. 15-0258-G-T (May 15, 2015) .....	5, 6, 22, 23

## Constitutional Provisions

N.M. Const. Art. XI .....	28
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## **I. QUESTIONS PRESENTED**

### **Question 1:**

Whether the circuit court exceeded its legitimate powers and committed a substantial legal error when it denied defendant Mountaineer Gas Company's ("MGC") motion for summary judgment, concluding that the Public Service Commission of West Virginia exceeded the statutory authority granted to it by the Legislature in approving MGC's Tariff.

### **Question 2:**

Whether the circuit court exceeded its legitimate powers and committed a substantial legal error when it concluded that the Public Service Commission of West Virginia approved a Tariff that failed to conform to the laws of this State and to all rules, regulations and orders of the Commission.

## **II. STATEMENT OF THE CASE**

This is a wrongful death and personal injury case that arises out of a tragedy that occurred on or about December 18, 2018, when the occupants of 7 Natural Bridge Road, Looneyville, Roane County, WV ("the house") were overcome by carbon monoxide generated by the home's malfunctioning gas furnace. The Carper Plaintiffs received gas service via a mainline tap on a third-party production gathering line neither owned nor controlled by MGC. MGC facilitated the delivery of gas to the Carpers' house by connecting a meter assembly to the mainline tap and customer service piping. The Summary Judgment Order at issue concluded that the Public Service Commission of West Virginia's ("PSC") historical and well-established use of liability limiting language in utility tariffs exceeded the PSC's delegated legislative powers. This decision has the potential to impact every utility and utility customer in the State. Should this decision stand, gas

utilities in particular will potentially face new exposure for third-party owned gas supplies and their customers' appliances, piping, and other gas facilities.

Plaintiffs<sup>1</sup> allege that MGC was negligent in that: (1) the natural gas supply to the house was inappropriate for residential use because of "impurities" and its higher than usual BTU content, which caused the gas furnace to malfunction; and (2) it breached its duty of care in the maintenance of its natural gas facilities. *See* First Amended Complaint (A. 0031-47); Ptf's. Response to MSJ (A. 0325). Plaintiffs assert claims for strict liability, failure to warn, breach of warranty, breach of contract, and negligent infliction of emotional distress based upon the same recitation of facts. *See* First Amended Complaint (A. 0031-47).

MGC moved for summary judgment, pursuant to Rule 56, seeking dismissal of Plaintiffs' claims because: (1) assuming, *arguendo*, that the natural gas was inappropriate for residential use, someone intentionally disabled the furnace's safety features that would have shut down the furnace and prevented this accident, thereby severing any causal chain to MGC; and (2) MGC's PSC-approved Tariff bars claims based upon the quality of third-party owned gas, the condition or the character of customer's equipment, and non-negligence theories of liability. *See* MGC Summary Judgment (A. 0069-89) (hereinafter "MSJ"). The Circuit Court denied MGC's Motion for Summary Judgment. *See* Order Denying Motion for Summary Judgment (A. 0001-0030) (hereinafter "Order").

MGC's Petition addresses the second issue, legal issues concerning the application of its Tariff. The Circuit Court committed substantial legal error when it concluded that the PSC exceeded its delegated legislative powers by approving Tariff provisions that protects MGC from

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<sup>1</sup> Plaintiffs include: Cory Carper (deceased); Amanda Carper, Christopher Carper, and Elijah Armstead, who were in the home and survived the carbon monoxide poisoning after being hospitalized; and Sandra Carper, Susan Foraker, and Susan Armstead, who claim to have suffered emotional distress upon finding the above-listed occupants at the house on the evening of the incident.

liability under certain circumstances. This was not an appropriate exercise of the Circuit Court's powers. MGC's Tariff exists because of the comprehensive statutory scheme enacted by the Legislature. The Legislature vested the PSC with broad powers over utilities to exercise its expertise to balance the public interest with protection of utilities against unreasonable demands. The Circuit Court erred when it declined to apply MGC's Tariff to grant MGC's Motion for Summary Judgment.

MGC is relying on its Tariff for narrow purposes. First, to protect it from claims based upon the quality of third-party owned gas supply because MGC cannot and does not control that gas supply, which is from a production gathering line. The Carpers were aware that they used unprocessed production gas. Second, to protect MGC from liability for a customer-owned furnace, which was indisputably malfunctioning but nevertheless was tampered with so that it would not shut off as designed. The Carpers deny knowledge of how the modifications occurred and there is no evidence that MGC was aware of the tampering prior to the incident. Third, to limit causes of action to negligence.

**A. Statement of Facts**

**1. MGC's Service Territory, Distribution System, and the Carper's House**

MGC is a West Virginia public utility that provides natural gas service to residential, commercial and industrial customers that are located in its service territory. *See* Order at ¶ 9 (A. 0004). It operates in accordance with the PSC's rules and regulations, as well as the Tariff that is approved by the PSC. It sells and delivers natural gas to the communities listed in its Tariff. *See id.*

Most of MGC's customers receive processed, "pipeline quality gas"<sup>2</sup> from its *distribution system*. The Carpers' house is located within MGC's service territory, but MGC's distribution system does not extend to the area where the Carper's home is located in the unincorporated community of Looneyville, W.Va. *See* Order at ¶ 10 (A. 0004); MSJ Ex. M, Westfall Aff. at ¶ 2 (A. 239). MGC has no ability to distribute natural gas to the house on its own. Instead, the Carpers received natural gas from a Core Appalachia<sup>3</sup> pipeline, which is a natural gas gathering pipeline that passes near the house. *See* Order at ¶ 12 (A. 0012); MSJ, Ex. M, Westfall Aff. at ¶ 3 (A. 239). Core Appalachia's pipeline transported unprocessed production gas from wells and gathering lines. *See* Order at ¶ 12 (A. 0012); MSJ Ex. M, Westfall Aff. at ¶ 3 (A. 239). Under MGC's Tariff, the Carpers are considered a Mainline Consumer.<sup>4</sup> *See* Order at ¶¶ 14-15 (A 0005).

The Carpers and customers like them – who receive natural gas that is unprocessed – are served via what are commonly referred to as "farm taps," "field taps," and/or "mainline taps." These terms are used interchangeably throughout this Petition.

## **2. West Virginia Policy Concerning Farm (Field) Tap Service**

The PSC recognizes the rural nature of West Virginia and has worked to facilitate access to inexpensive heat sources for its residents. As a result, through its tariff approval process, the PSC encourages utilities such as MGC to provide service to customers from any available third-

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<sup>2</sup> "Pipeline quality gas" refers to gas that a processing plant distilled, removing various hydrocarbons and fluids. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C.Cir. 2006). It has been described as, "A mixture of hydrocarbon compounds existing in the gaseous phase with sufficient energy content, generally above 900 British thermal units, and a small enough share of impurities for transport through commercial gas pipelines and sale to end-users." Glossary, United States Energy Information Administration, <https://www.eia.gov/tools/glossary/index.php?id=P>; *See also Abraham v. WPX Prod. Prods., LLC*, 317 F.R.D. 169, 177-79 (D.N.M. 2016) (explaining natural gas terminology).

<sup>3</sup> This the pipeline at issue is now owned by Diversified Energy Company. For purposes of this Petition, MGC will refer to Core Appalachia as the owner of the gas supplied to Carpers' house because it owned the pipeline at the time of the incident.

<sup>4</sup> The Mainline Consumer provision is discussed on pages 11–12, *infra*.

party source. *See* Order at ¶ 11 (A. 0004). The Circuit Court accepted this premise, which is demonstrated in PSC Orders.<sup>5</sup> Consistent with this policy, on or about May 31, 2019, the PSC opened a General Investigation into the Continuation of Natural Gas Service to Field Tap Customers and Areas Supplied by and Dependent on Conventional Gas Production, Public Service Commission of West Virginia, Case No. 19-0467-G-GI (May 31, 2019) (hereinafter “General Investigation I”). The PSC opened General Investigation I due to concerns that declines and changes in conventional gas production could disrupt or affect farm tap customers. This General Investigation followed on the heels of an earlier Case that also addressed farm taps. *See* General Investigation, upon the Commission’s own motion, to Consider Proposals for Consumer Protections, Farm Taps, and Filing Requirements for Applications by Natural Gas Utilities Field Pursuant to W. Va. Code § 24-2-1k, Public Service Commission of West Virginia, Case No. 19-0004-G-GI (Jan. 3, 2019) (hereinafter “General Investigation II”). *See* MSJ Ex. N. (A. 0285-316). Depending on estimates, these Cases affect 15,000-20,000 farm tap customers. *See* General Investigation II *supra*. at Appx. A, p. 2 (A. 0300); *See also* General Investigation I, *supra*, at 1. The PSC, in concert with industry stakeholders, was searching for operational and financial solutions to enabled continued and new use of farm tap service. *See* General Investigation I, *supra*; General Investigation II, *supra*.

The General Investigations referenced herein deal with overarching issues that are involved with farm tap service. An example of specific action by the PSC regarding farm tap service is its May 7, 2015, approval of new terms and conditions to Peoples Gas WV LLC’s Tariff. *See* MGC

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<sup>5</sup> MGC’s Motion for Summary Judgment cited an order from a different PSC decision in support of its Motion for Summary Judgment for the general proposition that the PSC encouraged farm taps. MGC recognizes that some of the PSC Orders referred in this Petition were not part of the summary judgment record. Because the Circuit Court made a finding of fact concerning policy on the subject of farm taps in ¶ 11 of the Order, MGC is citing those PSC orders as an example of that fact.

MSJ Reply Ex. S (A. 0509). The Peoples Gas Tariff provided liability protection with respect to field (farm) tap services. *See* Peoples Gas WV LLC, Public Service Commission of West Virginia, Case No. 15-0258-G-T (May 15, 2015)) (hereinafter “Peoples Order”). The protections that the PSC approved are contained in Section IX of the Peoples Gas Tariff. *See* MGC MSJ Reply Ex. S (A. 0509). In connection with this order, the PSC provided the following background:

On March 31, 2015, Commission Staff filed a Final Memorandum, stating that the content of Section IX is very similar to three paragraphs in the Peoples WV TLSA concerning gas delivery to new field tap customers on third party pipelines approved in Case No. 960133-G-C, Commission Order, February 16, 1996. The purpose of Section IX is to inform customers that the gas may be of less than ideal quality and that interruptions may occur. **Staff also noted that similar language is included in the Dominion Hope and Mountaineer Gas Company tariffs.**

Staff recommended approval of Section IX as an addition to the Peoples WV tariff so that the proposed terms and conditions of service are available to all customers, regardless of whether they are parties to a TLSA and to provide Peoples WV with liability protection.

Peoples Order, *supra*, at 1-2 (emphasis added). The provisions of MGC’s Tariff that are at issue in this case have been in effect since November 1, 2005, a decade before the Peoples Order. *See* MSJ Ex., M, Tariff at Sheet Nos. 11-12 (A. 0255-256).<sup>6</sup>

### 3. MGC Service to the Carpers’ House

As noted, the Core Appalachia pipeline transports unprocessed natural gas from wells and allows consumers living near the pipeline to apply for gas service supplied from the pipeline via a main line tap. *See* Order at ¶ 12 (A. 0004). MGC’s Operating Procedures refer to these as “Main Line Taps.” Once a consumer’s application for service via a main line tap is approved, the owner

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<sup>6</sup> The Circuit Court did not state that the PSC failed to appreciate the significance of these terms. In fact, in a proceeding in the early 1990s, the PSC made findings of fact regarding requests for gas service from a mainline tap that limited MGC’s liability for exposure for the reasons that MSJ argued at the Circuit Court. *See* MGC Petition for consent to enter into an agreement with consumers who prospectively request gas service from a mainline tap, Public Service Commission of West Virginia, Case No. 92-0313-G-PC (June, 29, 1994). This order resulted in the development of a Temporary Limited Service Agreement, which applies terms to the provision of farm tap gas.

of the third-party pipeline installs the main line tap and connects the tap to MGC's meter assembly set. MGC uses the meter set to measure and supply natural gas to homeowners. *See* Order at ¶ 13 (A. 0004-5). MGC bills these consumers and then reconciles their gas use with the owner of the pipeline. At the time of the incident, the Carper residence received gas in this manner and the Carpers were (and remain) "Mainline Consumers" (the Carpers and the Dyes). *See* Order at ¶¶ 14-15 (A. 0005).

MGC billed the Carpers monthly in exchange for providing the house with natural gas from the third-party pipeline, which it routed through equipment that MGC owned, installed, serviced, and maintained (hereinafter "facilities"). In this case, MGC's facilities consist of a manifold setting including two meters, two regulators, a shut-off valve, piping and a percolator ("perk") tank. The perk tank contained ethylene glycol (commonly known as anti-freeze), which is used to reduce water vapor in unprocessed production gas. Gas traveled through the perk tank before being measured by each customer's meter and then entering their respective houses. MGC periodically serviced and refilled the tank (with attendant record keeping). All of MGC's equipment is located "upstream" of the house, between the third-party pipeline and the house. *See* Order at ¶ 16 (A. 0005). At this location, MGC supplied gas to two consumers' residences through the manifold meter setting, each with their own meter and regulator. *See* Order at ¶ 17 (A. 0005).

**B. Carper House's Customer Gas Supply, Incident Furnace, and Replacement**

**1. There was no history of problems with the gas supply**

Amanda and Christopher Carper moved to 7 Natural Bridge Road in 2002 or 2003. *See* Order at ¶ 22 (A. 0006). Initially, they lived in a mobile home that used natural gas. *See id.* Around 2007, Christopher Carper demolished the house originally standing on the property and began building the present house. *See id.*; MSJ Ex. A, C. Carper at 12:14-13:18 (A. 0091-92). He reused

the existing customer gas service piping from the original house and connected it to the new house. *See* Order at ¶ 22 (A. 0006). The Carpers did not have any problems with their gas supply or service.<sup>7</sup> *See* MSJ Ex. A, C. Carper at 41:5-12, 44:20-23 (A. 0097). Both Amanda and Christopher Carper knew that their gas supply came from a pipeline. *See id.* at 26:20-27:3 (A. 0095); MSJ Ex. L, A. Carper at 55:19-23 (A. 0238).<sup>8</sup>

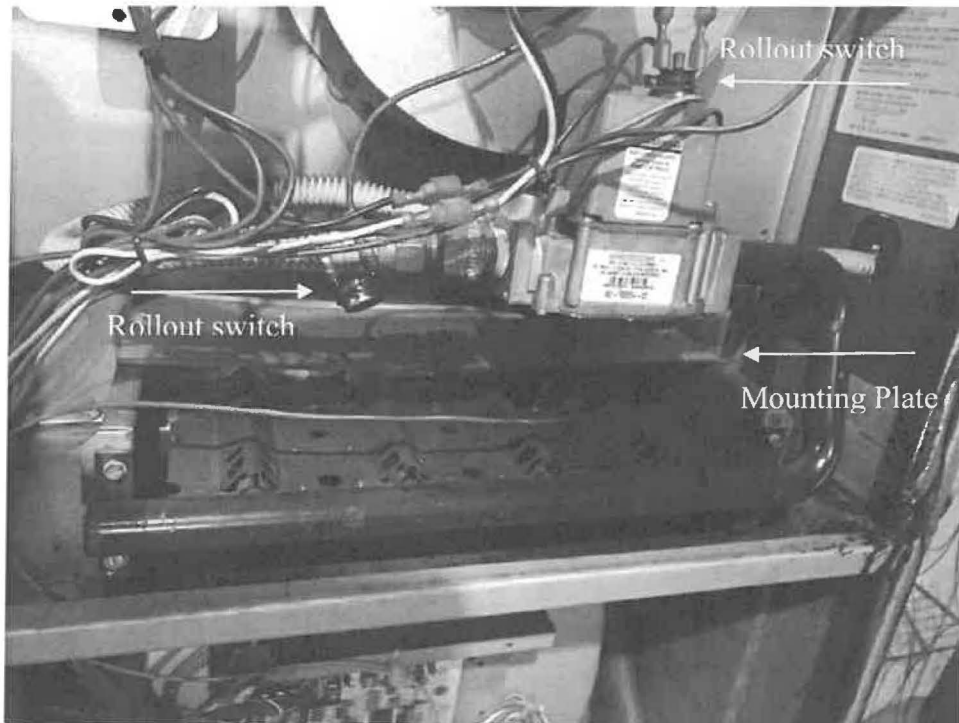
## **2. Installation and Operation of the Incident Furnace**

The house was heated with a Rheem furnace, which the Carpers purchased in or about 2008 and was installed by Arthur Wilson, a licensed HVAC technician. *See* Order at ¶ 23 (A. 0006). The furnace was a Rheem RGPN-10EBRJR manufactured in 2008. *See* MSJ Ex. K, Erlenbach Rpt. at 33-4 (A. 189-90); Ptf's. Response to MSJ, Ex. A at 3 (A. 348). The furnace was factory-equipped with two flame rollout switches, which are safety devices inside the furnace designed to protect against over temperature in the furnace's control compartment. *See* Order at ¶ 24 (A. 0007). Over temperature in the combustion chamber is one of several problems that can occur with a furnace. In other words, when a flame rollout switch trips, it does not indicate the existence of a specific type of problem, or the location of that problem within the furnace. Rather, it operates as an indicator that the furnace is not operating correctly and requires service. When a flame rollout switch trips, the manufacturer recommends an investigation by a qualified professional. *See .e.g., See* Order at ¶ 27 (A. 0007). When Mr. Wilson installed the furnace, the flame rollout switches were installed and located in their proper positions. *See* Order at ¶ 26 (A. 0007). The photograph, below, shows the location of those switches at the time of the incident.

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<sup>7</sup> Plaintiffs have not presented any history of gas quality issues in the area or associated with farm taps from the Core Appalachia pipeline. MGC has approximately 44 farm tap consumers on this pipeline.

<sup>8</sup> The other consumer served by the meter set at issue was the Dye house. That house used the same gas supply, through the same perk tank. *See* Order at ¶¶ 16-17 (A. 0005). The Dye house contained three (3) natural gas-fired appliances



MSJ Ex. H (A.0149).

The purpose of a flame rollout switch is to shut off the furnace when it is operating in an unsafe manner, which Plaintiffs' expert, Ron Natoli ("Natoli"), acknowledges. *See* Order at ¶ 25 (A. 0007). The furnace's user manual and a sticker on the subject furnace stated, "if this switch should trip, a qualified installer, service agency or gas supplier should be called to check and/or correct for adequate combustion air supply." *See* Order at ¶ 27 (A. 0007).

Christopher Carper's brother, Daniel Carper, performed annual inspections on the furnace, including the Fall of 2018. *See* MSJ Ex. A, C. Carper at 24:1-23 (A. 0094). Daniel is licensed to perform HVAC work. *See* MSJ Ex. I, D. Carper at 30:1-3 (A. 0151). Daniel testified that he did "maintenance and just changed the filters;" performing the latter task every couple of months. *See id.* at 87:10-88:2 (A. 0152). The Rheem manual explicitly recommends an annual inspection. *See*

MSJ Ex. D, Rheem Manual (A. 0120).<sup>9</sup> Plaintiff's expert, Bert Davis, Ph.D. ("Davis"), testified that the fouling of the furnace would have been detected in 2018 if there had been an annual inspection of the furnace. *See* MSJ Ex. E, Davis at p. at 156:14-17 (A. 0177). Nothing in the summary judgment record suggests that MGC knew about the condition of the furnace. A neighbor, Elbert Myers testified that prior to the accident Christopher Carper told him that he was having issues with his furnace and needed someone to look at it. *See* MSJ Ex. J, Myers at 32:20-33:03 (A. 0155-156).

The investigation revealed at least two modifications to the flame rollout switches. The factory installed switches had a Part Number 47-22861-03, which is reflected in the furnace parts list and had a date code of 0803 (3<sup>rd</sup> week of 2008). *See* MSJ Ex. K, Erlenbach Rpt. at 35 (A. 0191). These switches had a temperature set point of 250°F.<sup>10</sup> *See id.* At the joint inspection, it was discovered that the right-side flame rollout switch was a different part – Part Number 47-22861-01, which had a temperature set point of 350°F, and a date code of 1641 (41<sup>st</sup> week of 2016). *See id.* On this point Natoli testified:

Q. Okay. Should the – that right-side rollout switch been replaced with a 350-degree rollout switch?

A. No.

Q. It should've been replaced with a rollout switch that had a temperature setting of 250 degrees like the left-hand side; correct?

A. Correct.

Ptfs. Response to MSJ, Ex. C, Natoli at 118:22-119:4 (A. 0425).

Additionally, at some point prior to the carbon monoxide poisoning incident at issue, the flame rollout switches had been unscrewed and removed from their mounting holes and were

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<sup>9</sup> Although not part of the summary judgment record, this information is also included in MGC's communications with its customers.

<sup>10</sup> This is the temperature at which the flame rollout switch will trip and shut the furnace off.

sitting above and away from the gas burners. *See* Order at ¶ 28 (A. 0007). Both of Plaintiffs' experts agree that the flame rollout switches were intentionally removed from their factory-installed position. *See* Order at ¶ 29 (A. 00078). Davis testified that the removal of the flame rollout switches was an intentional act; that operating the furnace without the flame rollout switches in place is dangerous, not consistent with the manufacturer's intended operation; and a misuse of the product. *See* MSJ Ex. E, Davis at 37:22-38:24 (A. 0125). Natoli provided similar testimony, stating that the removal of a screwed in flame rollout switch is an intentional act – they do not just fall off the furnace. *See* MSJ Ex. C, Natoli at 102:24-103:4 (A. 0107).

Plaintiffs' experts also agree that if the flame rollout switches had been mounted properly, the switches would have operated within minutes and would have shut off the furnace. *See* Order at ¶ 36 (A. 0008). Davis opined that if the flame rollout switches were in place, then this accident would not have occurred. *See id.* Davis testified,

. . . I will say the incident may have occurred earlier in the fouling process, but with this particular incident, the one we're talking about on December, yes. **From what I can tell if the flame rollouts were in place, it would have prevented this incident.**

MSJ Ex. E, Davis at 156:22-157:4 (emphasis added) (A. 0137-138). Natoli testified,

Q. So based on the results of the testing that was done in February of 2020, if the rollout switches had been properly mounted in the furnace on December 17<sup>th</sup> and December 18<sup>th</sup> of 2018, the rollout switches would've operated and shut off this furnace?

A. Mostly likely I would agree with that, yes.

MSJ Ex. C, Natoli at 123:14-19 (A. 0112).

### 3. Replacement Furnace

After the incident, the Carpers replaced their furnace. *See* MSJ Ex. F, Int. Response 12 (A. 0140). Upon information and belief, they continued to live in the house without incident and

without issues with the gas supply. A little over a year after the incident, Amanda and Christopher Carper moved to Tennessee; however, MGC continued to supply natural gas to the house via the same farm tap and meter setting without any reported service issues. Upon information and belief, their son lives in the house. Currently, service is suspended at the house due to non-payment, but the physical connection remains.

### **C. MGC Tariff Provisions**

In its Motion for Summary Judgment, MGC relied on three Tariff provisions, each for a different purpose.

The Carpers were Mainline Consumers. Mainline Consumers are defined as, “[T]hose retails consumers who are provided with service by the Company from pipeline or transmission facilities owned by third parties rather than directly from the distribution system of the Company.” *See* MSJ Ex. M, Tariff at Definitions (A. 0250). With respect to Mainline Consumers, the Tariff states:

Notwithstanding any provision to the contrary within these Rules and Regulations it is expressly understood that for Mainline Consumers the Company has no control over the quality and quantity of natural gas to be delivered to the Mainline Consumer by the third party pipeline and the Company makes absolutely no warranty, express or implied, that the natural gas will be of pipeline quality or suitable for use by the Mainline Consumer.

*Id.* at § 2.6 (A. 0255).

MGC’s Tariff defines the point of delivery as the outlet of the gas meter where the customer’s piping connects. *See id.* at Definitions (A. 0251). The furnace at issue was a customer-owned facility. The Tariff states, in relevant part:

The Company does not guarantee or undertake, beyond the exercise of due diligence and its duty as a utility, to furnish a sufficient supply of gas at all times and shall not be liable for failure to do so, beyond its available supply; *nor shall it be liable for any injury to person or property from any cause arising inside the Customer’s property line not the result of the negligence of the Company; nor shall*

*it be liable for any injury to person or property arising from the use of gas by, or the supply of gas to, the Customer which is not the result of negligence on the part of the Company.*

*Id.* at § 3.1 (emphasis added) (A. 0255).

The Company will not be liable for damages to or injuries sustained by Customers or others, or by the equipment of the Customer or others by reason of the condition or character of the Customer's facilities and equipment of others on Customer's premises. The Company will not be responsible for the use, care or handling of the gas service delivered to Customer after same passes beyond the point of the delivery.

*Id.* at § 3.3 (A. 0256).

### **III. SUMMARY OF THE ARGUMENT**

The Legislature specifically delegated the PSC broad authority to oversee West Virginia's public utilities, including, gas, electric, water, sewer, and telecommunications. The sliver of the West Virginia Code that the Circuit Court relied upon ignores the legislative purpose as a whole. The PSC's overarching mandate is to ensure that public utilities operate in a manner that both ensures the public interest and provides protection to utilities from unreasonable demands. The PSC may employ a variety of tools for determining utility rates as it deems suitable, so long as the end result guarantees West Virginia consumers good service at fair rates and enables utilities to earn a competitive return for their stockholders upon their investment in West Virginia. The enabling legislation does not prevent the PSC from using limitations of liability to protect utilities from unreasonable demands.

One of the primary tools for doing so is its rate setting function, which results in tariffs. Tariffs have the force and effect of law. In addition to setting rates, these tariffs govern the rules, regulations, and practices related to rate-based and charge-based services between a utility and its customers. In other words, a utility's tariff sets the terms and conditions of service. Neither the utility nor the customer can deviate from a tariff's terms. There is a long history of utilities using

tariff provisions to limit their liability under certain circumstances and a similarly long history of courts applying those limitations as they are written. Although this specific question is one of first impression in West Virginia, the fundamental pillars of liability limiting tariffs exists in West Virginia's statutes, regulations, and case law. In denying MGC's Motion for Summary Judgment, the Circuit Court substituted its own judgment for that of the PSC.

Here, a carbon monoxide incident occurred at the home of MGC farm tap consumers, Amanda and Christopher Carper. The investigation of the incident revealed that the Carpers' furnace was malfunctioning and that someone had tampered with the furnace's safety controls (flame rollout switches) to keep it running when it was not safe to do so. If the safety controls had been in their proper location, then this incident would not have occurred.

This incident implicates three (3) provisions in MGC's Tariff that limit Plaintiffs' claims. First, because the Carpers receive service via a farm tap, they are Mainline Consumers and cannot hold MGC liable for the quality of the gas that they receive. At its most basic level, this is because they use unprocessed production gas from a third-party pipeline company. Plaintiffs made the decision not to sue the third-party pipeline company. Second, there is no dispute that this incident occurred because someone intentionally tampered with and disabled the furnace's safety controls. MGC's Tariff bars its customers from holding it liable for problems with customer equipment and gas facilities. Customers are in the best position to service and maintain their equipment. This provision reflects the idea that a gas utility should not be a guarantor or insurer of the customer's facilities. Third, MGC's Tariff only permits claims for negligence. Thus, in appropriate factual scenarios, MGC can be held liable if it breaches its duty of care.

Here, these limitations of liability are reasonable. Plaintiffs are attempting to hold MGC liable for gas supplied by Core Appalachia and for the Carpers' failure to properly maintain their

furnace. The results of this incident are tragic. However, that does not render the provisions unreasonable. Enforcing the Tariff's plain language does not leave plaintiffs without recourse. In this case, Plaintiffs could have sued Core Appalachia, the furnace manufacturer, or the persons who installed and/or serviced the furnace. The Carpers could have had their furnace serviced or, given the intentional disabling of the safety controls, pursued a claim against the person who did that. MGC is not immune from suit; however, Plaintiffs' claims cannot be premised on the quality of gas, nor on MGC being responsible for problems with the Carpers' furnace.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

MGC respectfully requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as this case involves issues of first impression and issues of fundamental public importance.

#### **V. ARGUMENT**

##### **A. Standard for Writ of Prohibition**

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such exceeds its legitimate powers. W. Va. Code, 53-1-1." Syl. Pt. 1, *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998) (citations omitted). The guidelines for evaluating whether a writ of prohibition should issue are set forth in Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower

tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

*Id.* The most important factor to consider is whether the Circuit Court's order is clearly erroneous as a matter of law. *See State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 145, 697 S.E.2d 730, 137 (2010) (citing *Hoover*, 199 W. Va. 13, 483 S.E.2d 12, Syl. Pt. 4.).

**B. The Circuit Court's Order is Clearly Erroneous as a Matter of Law. The PSC did not exceed its statutory authority by approving liability-limiting language in MGC's Tariff.**

**1. Rules of Statutory Interpretation**

"Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [this Court applies] a *de novo* standard of review." Syl. Pt. 2, *Thomas v. McDermitt*, 232 W. Va. 159, 751 S.E.2d 264 (2013) (quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)). "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. Pt. 6, *Barber v. Camden Clark Mem. Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (quoting Syl. Pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953)). "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but apply the statute." *Id.* at Syl. Pt. 7 (quoting Syl. Pt. *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959)). "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." *Id.* at Syl. Pt. 8 (quoting *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)).

**2. The Legislature's delegation of power is broad and without preference as to methods, as long as it safeguards the interests of the public and financial health of regulated utilities**

In 1913, the Legislature established the PSC and delegated legislative power to the PSC for the purpose of overseeing and regulating gas companies. *See United Fuel Gas Co. v. Pub. Serv. Comm'n*, 73 W. Va. 571, 80 S.E. 931 (1914) (upholding the delegation of legislative ratemaking authority to the PSC). Periodically, this Court has acknowledged the PSC's authority. *See Chesapeake & Potomac Tel. Co. v. Morgantown*, 144 W. Va. 149, 160, 107 S.E.2d 489, 496 (1959) (citations omitted) ("The paramount design of pertinent statutes to place regulation and control of public utilities exclusively with the [PSC] has been recognized previously by this Court."). The PSC "was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public." Syl. Pt. 1, *City of S. Charleston v. W. Va. Pub. Serv. Comm'n*, 204 W. Va. 566, 514 S.E.2d 622 (1999) (citations omitted). "Rates set by the legislature and the [PSC] are presumed to be valid." *Columbia Gas of W. Va., Inc. v. Pub. Serv. Com'n of W. Va.*, 173 W. Va. 19, 23, 311 S.E.2d 137 (1983) (affirming a PSC order that a utility challenged on Constitutional grounds). The procedure for changing MGC's rates and practices is vested with the PSC and set forth in W. Va. Code § 24-2-4a(b). Courts do not have the power to change or void the terms of a valid tariff. *See e.g., Verizon Virginia LLC v. XO Communications, LLC*, 144 F.Supp.3d 850, 858-59 (E.D. Va. 2015); *Sallee Horse Vans, Inc. v. Pessin*, 763 S.W.2d 149, 150 (Ky. 1988).

The Legislature delegated to the PSC the general power to regulate public utilities. *See* W. Va. Code §§ 24-2-2 and 24-2-3 (delegating the power to promulgate tariffs for all public utilities on a prospective basis). "The term 'public utility tariffs' is universally understood to mean more

than just PSC-approved rates and charges. **[These tariffs] also govern[] the rules, regulations, and practices related to rate-and charge-based services between a utility and its consumers.”**

*Holt v. West Virginia-American Water Co.* 233 W. Va. 688, 692, 760 S.E.2d 502 (2014) (emphasis added).

The extent of the Circuit Court’s analysis of the PSC’s authority is included in ¶ 65 of the Order, wherein it quotes a portion of a sentence from W. Va. Code § 24-2-2. The Order ignored the remainder of the statutory scheme. The purpose and policy underlying the delegation of legislative power to the PSC is stated in W. Va. Code § 24-1-1, clearly and broadly. For example, one provision of this statute states:

The Legislature creates the [PSC] to exercise the legislative powers delegated to it. The [PSC] is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the state’s economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.

W. Va. Code § 24-1-1(b). No interpretation is required; the Legislature plainly vested the PSC with broad discretion. The Circuit Court incorrectly construed W. Va. Code § 24-2-2 as limiting the PSC’s powers, without regard for the PSC’s purpose. West Virginia Code § 24-2-2 (cited in part by the Order at ¶ 65) states:

The commission may investigate all rates, methods, and practices of public utilities subject to the provisions of this chapter; **to require them to conform to the laws of this state and to all rules, regulations and orders of the commission not contrary to law ....**

W. Va. Code § 24-2-2(a) (emphasis added). This statute does not indicate that the Legislature intended to deprive the PSC the authority to limit utilities’ exposure to liability for certain claims. In fact, as discussed *infra*, there is a long-standing history of State and Federal regulators using tariffs to limit liability as means of balancing the interests that regulators are legislatively empowered to consider. And there is a long-standing history of courts upholding those provisions.

Contrary to the plain language of the statute, the Circuit Court imposed a limitation on the PSC's powers under W. Va. Code § 24-2-2. The Order neither cites any prior decisions that delineate such a limitation, nor does it explain why such a limitation is appropriate given the Legislature's broad delegation of power. "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 13, *Barber*, 240 W. Va. 663, 815 S.E.2d 474 (quoting Syl. Pt. 1, *Consumer Advocate Div. v. Public Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989)). The Legislature enacted this language in 1913 as part of the original law. Tariffs exist for every PSC-regulated utility in West Virginia. Neither the Circuit Court nor Plaintiffs cited relevant examples of the PSC exceeding its delegated powers regarding a utility.

The only case that the Order cites, *Eureka Pipe Line Co. v. Pub. Serv. Comm'n*, 148 W. Va. 674, 137 S.E.2d 200 (1965), is an example of this Court curbing the PSC's authority because the business at issue *was not* a *utility company*. Here, there is no dispute that MGC as a public utility fits squarely within the PSC's jurisdiction. Thus, *Eureka* is being taken out of context. *Eureka* involved a dispute wherein the PSC attempted to regulate an oil producer. *See id.* at 683, 137 S.E.2d at 205. This Court stated this clearly in the paragraph that followed the section quoted by the Order:

Code, 1931, 24-2-1 as amended, provides: "The jurisdiction of the commission shall extend to all public utilities in this State, \* \* \*." The same section of the Code proceeds to enumerate various public services over which the commission's jurisdiction extends. **Quite clearly the public service commission would transcend its statutory jurisdiction, power and authority if it should undertake to exercise control over business enterprises not falling within the classification of public utilities. Admittedly, Devonian and the other producers of oil involved in this case are not public utilities and, therefore, they are not within the jurisdiction of the public service commission.**

*Id.* (emphasis added). Additionally, *Eureka* arose from an order after a PSC proceeding, not civil litigation between private parties. *See id.* at 675, 137 S.E.2d at 200-01. Although the basic concept regarding delegation of powers is correct, *Eureka* did not apply the enabling legislation<sup>11</sup> W. Va. Code § 24-2-1 in a way that informs the issues in this case.

Finally, W. Va. Code § 24-4-7 does not support the Circuit Court’s analysis. This section addresses the concept of primary jurisdiction doctrine and the filed rate doctrine.<sup>12</sup> MGC did not challenge the Circuit Court’s jurisdiction over this matter. As a general matter, bodies of law prohibit individual litigants from challenging and effectively modifying rates through litigation.<sup>13</sup>

**C. The Application of Tariff Limitations on Liability is a Significant Issue of First Impression that Impacts all West Virginia Public Utilities.**

**1. Historically, utility tariffs’ limitations on liability are enforced, which is consistent with West Virginia case law**

Decisions enforcing limitations of liability in utility tariffs date back at least a century. In 1921, the United States Supreme Court held that limitations on liability in a utility’s tariff must be enforced, stating: “The limitation of liability [is] an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.” *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 570-575, 41 S.Ct. 584, 586-

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<sup>11</sup> The section at issue was W. Va. Code § 24-2-1, which established the PSC’s jurisdiction.

<sup>12</sup> “Where an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency’s special expertise and which extends beyond the conventional experience of judges, the doctrine of primary jurisdiction applies. In such a case, the court should refrain from exercising jurisdiction until after the agency has resolved the issue. The court’s decision whether to apply the primary jurisdiction doctrine is reviewed on appeal under an abuse of discretion standard.” Syl. Pt. 1, *State ex rel. Bell Atlantic-West Virginia v. Ranson*, 201 W. Va. 402, 497 S.E.2d 755 (1997).

<sup>13</sup> “Thus, the filed rate doctrine bars not only lawsuits challenging filed rates or seeking to enforce rates different from the filed rates, but also lawsuits challenging services, billing or other practices when the challenge, if successful, would effectively result in a modification of the filed tariff through the award of damages. ... There is no question that the doctrine has been used repeatedly to bar myriad claims seeking monetary recovery.” *Gallivan v. AT&T Corp.*, 124 Cal. App. 4th 1377, 1382, 21 Cal. Rptr. 3d 898, 901-02 (2004) (internal citations omitted).

588 (1921). Two years later, deciding a tariff case involving a West Virginia water utility and a tariff filed with the PSC, the United States Supreme Court stated: “The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. **Its order is of the same force as would be a like enactment by the legislature.**” *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm’n. of W. Va.*, 262 U.S. 679, 683, 43 S. Ct. 675, 676 (1923) (rejecting allegations that rates were confiscatory and beyond legislative power, in violation of the Fourteenth Amendment) (emphasis added).

As recently as 2015, in *Maryland Cas. Co. v. NSTAR Elec. Co.*, 471 Mass. 416, 30 N.E.3d 105 (2015), the Supreme Judicial Court of Massachusetts discussed the history of utility regulation and tariff limitations of liability, and why those provisions are enforceable. *See Maryland Cas.*, 30 N.E.3d at 110-112.

In the late Nineteenth Century, this contract-based approach gave way to the now dominant tariff-based model for public utilities regulation. *See* Kearney & Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1331-1332 (1998) (Kearney & Merrill). Under that model, the “progenitor” of which was the 1887 Interstate Commerce Act (ICA), a public utility is required to file a tariff, which contains all rates and all regulations, practices, or classifications affecting those rates. *See* Kearney & Merrill, *supra* at 1331. Once the tariff is approved by the relevant regulatory agency, any deviation from it is strictly prohibited. *Id.*

*Id.* at 112. This discussion of the historical adherence to the terms of a tariff is significant here because the West Virginia Public Service Law is modeled on the Interstate Commerce Act. *See State ex rel. Knight v. Pub. Serv. Comm’n*, 161 W. Va. 447, 458-461, 245 S.E.2d 144, 150-152 (1978) (discussing that W. Va. Code § 24-2-4 (1974), which details the procedure for change rates, has an identical legislative history to the analogous provision of the ICA). Although many of the early U.S. Supreme Court cases involved telegraph companies, in 1981 the Court explicitly extended the concept to natural gas companies and the Natural Gas Act. *See Ark. La. Gas Co. v.*

*Hall*, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L.E.2d 856 (1981).<sup>14</sup> *Maryland Cas.* also emphasized the importance of the U.S. Supreme Court's decisions on this point, quoting *Esteve Bros.* and other opinions:

Finally, a judicial decision invalidating the "Limitation of Liability" clause would have effects beyond the clause itself. "The limitation of liability was an inherent part of the rate" set by the [Department of Public Utilities], and "[t]he company could no more depart from it than it could depart from the amount charged for the service rendered." *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. at 571, 41 S.Ct. 584. **Because "the rates as fixed by the [DPU] are established with the rule of limitation in mind," invalidation of the limitation would undermine the broader structure by which both the public utility's "rights and privileges" as well as "its liabilities" are carefully defined and limited.** *Waters v. Pacific Tel. Co.*, 12 Cal.3d 1, 7, 114 Cal.Rptr. 753, 523 P.2d 1161 (1974)

*Maryland Cas. Co.*, 30 N.E.3d at 114 (emphasis added).

MGC operates in the same type of heavily regulated environment, according to the laws enacted by the West Virginia Legislature and the rules and regulations established by the PSC. Its tariffs are presumed to be valid, have the force and effect of law, and cannot be modified by courts.

**2. Other gas utilities have tariff language that limits liability, with PSC approval. The Circuit Court's Order has significant policy implications.**

The PSC dockets for General Investigations I and II, *supra*, and Peoples Gas Order, *supra*, demonstrate the degree to which the PSC must utilize its fact-finding powers and expertise to craft solutions that further its legislative purpose. The PSC has discretion to deploy different methods available in order to do so. *See Syl., Virginia Elec. & Power Co. v. Public Serv. Comm'n*, 161 W. Va. 423, 242 S.E.2d 698 (1978). The Court's order has policy implications for two broad categories (1) gas utilities' exposure to liability for third-party owned gas from farm (field) tap services, and

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<sup>14</sup> In this case, the United States Supreme Court was discussing these concepts in terms of "the filed rate doctrine," *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 373 F.Supp.2d 631, 635 (S.D. W. Va. 2005). The "filed rate doctrine" is another way of expressing the term tariff. This language is used in some of the cases because the tariff limits the rates. It is applied to bar claims in a variety of contexts. *See E.J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027 (9th Cir. 2007).

(2) gas utilities' exposure to liability for issues downstream of the meter set, including consumers' piping and appliances. In practical terms, this raises questions about gas utilities' ability to supply gas from farm taps and their rates due to potential liability associated with customer appliances.

Hope Gas, Inc. and Peoples Gas WV, Inc. have tariffs that include language that limit their liability for farm tap service, just like MGC. *See* MGC MSJ Reply Ex. (A. 0507-509). The PSC entered the Peoples Gas Order, *supra*, three (3) years before the incident that gave rise to this lawsuit. Section 2.6 of MGC's tariff, limiting exposure to liability for Mainline Consumers, is not a vestigial relic of prior rate cases. As the Peoples Gas Order demonstrates, the PSC is aware of gas utilities' potential exposure to liability for third-party owned gas, which the PSC knows is not the same as processed gas, and provided all these utilities with protection from lawsuits over gas quality as part of their strategy to increase the availability of natural gas to those living in remote areas. To be clear, these are consumers who are not on gas utilities' *distribution systems* and would not be able to obtain natural gas service otherwise. By ruling that the PSC did not have the authority to approve § 2.6 of MGC's tariff, the Circuit Court inserted itself into the legislative, ratemaking process.

Similarly, the PSC commonly approves tariff language that limits gas utilities' liability for issues on the consumers' side of the gas service and requires proof of negligence to establish liability. Sections 3.1 and 3.3 of MGC's tariff are examples of this.<sup>15</sup> The Circuit Court's disregard of these provisions has the effect of turning a gas utility into a target defendant even when facts conclusively establish that the consumer's appliances were not operating properly. This has

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<sup>15</sup> Again, the Peoples Gas WV tariff is illustrative on this point, in pertinent part, "... nor shall [the Company] be liable for any injury to person or property from any cause arising inside the consumer's property line not the result of the negligence of the Company; nor shall it be liable for any injury to person or property arising from the use of gas by, or the supply of gas to, the consumer which is not the result of negligence on the part of the Company." Peoples Gas WV, Rules and Regulations § V, available at: [https://www.peoples-gas.com/my-account/understand/files/gas-rates-files/Peoples\\_WV\\_Tariff.pdf](https://www.peoples-gas.com/my-account/understand/files/gas-rates-files/Peoples_WV_Tariff.pdf)

happened here. It is undisputed that safety devices the Carpers' furnace was had been intentionally disabled and the furnace should not have been operating. The Circuit Court's Order upsets the PSC's strategic balancing plan by which the PSC factored in MGC's liability and responsibility for safety in setting MGC's approved rates. With this sweeping Order, the Circuit Court effectively made MGC and other gas utilities guarantors of their consumers' piping and appliances.

**3. Numerous jurisdictions apply utility tariff provisions that limit liability as written.**

Many jurisdictions have followed suit and applied utility tariffs to limit the liability of electric, gas, and telecommunications companies when a plaintiff's claim fell within the scope of the tariff's limitation of liability language.<sup>16</sup> Among these, Texas' case law has the most comprehensive discussion of the history and diverse application of utility tariff limitations of liability provisions: *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 S.W.2d 668 (Tx. 1999), *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211 (Tx. 2002), *Del Carmen Canas v. Centerpoint Energy Resources Corp.*, 418 S.W.3d 312 (2013), *CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 305 (Tx. 2022). Texas' case law is also noteworthy because it demonstrates the range of claims that are subject to a utility tariff: damages for (1) interruption of service against an electric utility in *Auchan*, (2) personal injury and property damage due to power fluctuations at a home in

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<sup>16</sup> *US Airways, Inc. v. Qwest Corp.*, 361 P.3d 942 (Ariz. App. 2015), *aff'd in part*, 241 Ariz. 182 (2016); *Los Angeles Cellular Telephone Co. v. Superior Court*, 65 Cal.App.4<sup>th</sup> 1013 (1998); *Landrum v. Florida Power & Light Co.*, 505 So.2d 552, 554 (Fla. Dist. App. 1987); *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc.*, 204 S.E.2d 457 (Ga. App. 1974); *In re Illinois Bell Switching Station Litigation*, 641 N.E.2d 440 (1994); *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 986 P.2d 377, 383 (Kan. 1999); *Maryland Cas., supra*; *Computer Tool & Engineering v. NSP*, 453 N.W.2d 569, 573 (Minn. App. 1990); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 558 (Nev. 1992); *Coachlight Las Cruces, LTD. v. Mountain Bell Telephone Co.*, 664 P.2d 994 (N.M. 1983); *Lee v. Consolidated Edison Co. of New York*, 413 N.Y.S.2d 826 (1978); *Simpson v. Phone Directories Co.*, 729 P.2d 578 (Or. App. 1986); *State Farm Fire & Cas. Co. v. PECO*, 54 A.3d 921, 927 (Pa. 2012); *Houston Lighting & Power Co. v. sd USA, Inc.*, 995 S.W.2d 668 (Tx. 1999), *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211 (Tx. 2002), and *Del Carmen Canas v. Centerpoint Energy Resources Corp.*, 418 S.W.3d 312 (2013); *CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 305 (Tx. 2022).

*Grant*, (3) wrongful death due to an alleged natural gas explosion in *Del Carmen Canas*, and (4) personal injuries to house guests due to an alleged natural gas explosion in *Ramirez*. *The circumstances of a plaintiff's claim dictate the effect of a utility tariff, not a plaintiff's injury.*

Some of the important conceptual lessons from this line of case law are:

- **First**, in *Auchan*, the court cited the U.S. Supreme Court's decisions in *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1, 14 S. Ct. 1098, 38 L.Ed. 883 (1984), and *Sw. Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 79 S. Ct. 1210, 3 L.Ed.2d 1334 (1959). *Auchan's* reference to *Southwestern Sugar* is noteworthy for adding a layer of sound rationale for enforcing a limited exculpatory clause.

For all we know, it may be that the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the [utility] of the expense of insuring itself against liability [for specific reasons], and is a reasonable rate so computed.

*Auchan*, 955 S.W.2d at 671 (quoting *Southwestern Sugar*, 360 U.S. at 417-418, 79 S. Ct. 1210.) This rationale appears consistently in recent decisions that have applied utility tariffs.<sup>17</sup>

- **Second**, consumers are in the best position to protect against certain losses. *See id.* at 674. The Supreme Court of Texas explained:

In *Southwestern Sugar*, the [United States Supreme] Court held that a utility customer should not be entitled to benefit from a lower rate based on the utility's protection from liability and then be able to "repudiate the correlative obligation of procuring its own insurance" by suing the utility for damages. *Id.* Here again, the reasoning of the PUC and other courts is persuasive.

*Id.* at 674 (citing *Southwestern Sugar*, 360 U.S. at 418, 79 S.Ct. 1210). By analogy, the Carpers were in the best position to protect against this incident by properly servicing and maintaining their furnace.

- **Third**, given how utilities operate, limitations of liability are fair. The court stated:

[t]he theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges shall likewise be regulated and limited as to its liabilities. In

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<sup>17</sup> Even though West Virginia has not applied such a limitation of liability, this Court has previously recognized the importance of rate structures to a utility's operation. *See State ex rel. Knight*, 161 W. Va. at 461-462, 245 S.E.2d at 150-52 (quoting *United Gas Pipeline Co. v. Memphis Gas Division*, 358 U.S. 103, 113, 79 S. Ct. 194, 200, 3 L.Ed.2d 153 (1958)).

consideration of its being peculiarly the subject of state control, “its liability is and should be defined and limited.” There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the commission are established with the rule of limitation in mind.

*Id.* at 674 (quoting *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal.App.2d 416, 246 P.2d 686 (1952)) (citations omitted).

- **Fourth**, a utility’s administrative responsibilities and burdens are incentive for operating in a safe manner, to avoid accidents:

The PUC also imposes administrative penalties on utilities that do not provide safe, adequate, reasonable and efficient service to customers. *See, e.g.,* Tex. Pub. Util. Comm’n, *Entergy Gulf States, Inc. Service Quality Issues (Severed from Docket No. 16705)*, Docket No. 18249 (Apr. 22, 1998) (order on rehearing); Tex. Pub. Util. Comm’n, *Application of Houston Power and Light Co.*, Docket No. 4540, 1982 WL 213186 (Dec. 6, 1982) (final order). These penalties can include lowering a utility’s reasonable return on investment capital, adopting minimum performance target levels the utility must meet, adopting customer-service performance benchmarks, requiring quality assurance through independent audits and consultants, and requiring the utility to provide notice to customers about a utility’s service quality requirements. *See, e.g.,* Tex. Pub. Util. Comm’n, *Entergy Gulf States, Inc.*, Docket No. 18249, at 27–28.

*Grant*, 73 S.W.3d at 221. Even with a tariff limitation of liability provision a utility has an incentive to operate in a manner that avoids accidents because regulators can revisit tariff language.

In short, many reasons exist for the PSC’s broad authority and its use of tariffs to ensure the public interest and protect utilities from unreasonable demands.

#### **4. Decisions relied upon by the Circuit Court are readily distinguishable.**

MGC is not suggesting that it is immune from claims for negligence. A plaintiff’s allegations and the facts of a given incident dictate how a tariff applies, if at all. The Circuit Court’s Order, at ¶ 72, cited decisions from Kansas, New Mexico, Illinois, and Connecticut, for the proposition that tariffs cannot be applied to limit liability. The Circuit Court’s analysis of these cases is flawed.

The Kansas decision, *Forte Hotels v. Kansas City Power & Light Co.*, 913 S.W.2d 803 (Kan. 1995), was overruled in relevant part by *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 986 P.2d 277 (Kan. 1999), as explained in *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 999 S.W. 326 (Mo. App. 1999).<sup>18</sup> The Court of Appeals' holding stated this clearly and echoed the issues discussed, *supra*, herein.

In accordance with the Kansas Supreme Court's response to our certified questions, we hold that the trial court did not err insofar as it held invalid KCP&L's purported disclaimer of its liability for willful and wanton misconduct. Such a disclaimer is not reasonable or enforceable under Kansas law. **However, the trial court did err in refusing to give effect to so much of the tariff as disclaimed liability for KCP&L's own simple negligence. The Kansas Supreme Court has held that such a disclaimer is reasonable and sound public policy in light of the oversight provided by the KCC and the KCC's intent and responsibility to insure reasonable rates for reasonable service.** The Kansas Supreme Court has also held that it would give effect to such a disclaimer of liability for ordinary negligence even though contained in a tariff that purported to also disclaim liability for willful and wanton misconduct. To the extent our decision in *Forte Hotels* holds to the contrary, it is no longer to be followed.

*Danisco Ingredients USA, Inc.*, 999 S.W. at 333 (emphasis added). Therefore, the Circuit Court's reliance on *Forte Hotels* is misplaced.

The New Mexico decision *Southwestern Public Service Co. v. Artesia Alfalfa Growers Ass'n*, 353 P.2d 62 (N.M. 1960), has been superseded by an amendment to the Constitution of the State of New Mexico. This is a peculiar line of case law, and it does not transfer easily. The premise of *Artesia Alfalfa* was that the Public Service Commission of New Mexico did not have the authority to allow utilities to avoid liability for any theory of liability. Approximately 23 years later, in *Coachlight Las Cruces, LTD. V. Mountain Bell Telephone Co.*, 664 P.2d 994 (N.M. App. 1983), the New Mexico Court of Appeals ruled differently because the entity involved – the State

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<sup>18</sup> The Court of Appeals of Missouri was applying the Kansas Supreme Court's decision on two certified questions from earlier that year. *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 986 P.2d 277 (Kan. 1999).

Corporation Commission – derived its authority from the State Constitution, not statute. The Court of Appeals stated, in part:

Defendant contends that there is a significant difference between *Artesia Alfalfa, supra*, and the present case. Its contention is based on the fact that in *Artesia Alfalfa, supra*, the rule was approved by a statutorily created body, the Public Service Commission, whose authority was delegated by the Legislature; whereas, in the present case, we are dealing with a tariff adopted by the Corporation Commission whose rate-making authority is legislative in nature and constitutionally derived.

*Id.* at 997-998. In 1996, New Mexico amended its State Constitution and eliminated the Public Service Commission and Corporation Commission and created the Public Regulation Commission. *See* N.M. Const. Art. XI, §§ 1-2. As noted, this line of cases is somewhat unique; however, at a minimum it establishes that *Artesia Alfalfa* is no longer good law as to public utilities in New Mexico and does not support the Circuit Court's Order.

As to the Illinois decision, in *Adams v. Northern Illinois Gas Co.*, 809 N.E.2d 1248 (Ill. 2004), the fatal flaw in the utility's argument was that it had notice of a potential defect in the customer's equipment. This case involved a Cobra connector, which was a flexible brass connector located on the consumer-side of the meter set (in homes). Later, utilities learned that Cobra connectors were prone to failure due to a chemical reaction with the odorant that natural gas utilities add to serve as a warning agent. This was well-documented within the industry. *See Adams*, 809 N.E.2d at 308-309. In short, the gas utility had actual knowledge of a potential defect in *Adams*.

As to the legal argument concerning the application of the tariff limitation of liability provision, *Adams* avoided the effect of those provisions for reasons that are not present here. *Adams* presented a different issue with the tariff's application, which also turned on a provision that attempted to draw a distinction between the customer's and the utility's equipment. *See*

*Adams*, 809 N.E.2d at 1263. The utility's argument failed in *Adams* because it overreached in its application of the tariff. *See id.* at 1268-73. The court stated,

Turning to the NI-Gas tariff provision in this case, it is evident that the tariff essentially codifies the common law rule that a gas company has no duty with respect to a consumer's gas pipes and fittings, based on the consumer's responsibility for maintaining his or her own equipment and the company's lack of control and knowledge. *See, e.g., Clare*, 356 Ill. at 243-45, 190 N.E. 278 (stating common law rule). However, NI-Gas contends that the tariff provision eliminates the common law *exception* to this rule. According to NI-Gas, the tariff provision absolves it from any duty with respect to a consumer's pipes and equipment **even if it has knowledge that a customer's appliance is leaking or is otherwise unsafe for the transportation of gas**. *See, e.g., Belleful*, 243 Minn. at 128-29, 66 N.W.2d at 783-84 (stating common law exception).

*Id.* at 1268 (emphasis added). The court noted that the Illinois Commerce Commission rejected the notion of absolute tort immunity in the past, which made the utility's position untenable. *Id.* at 1269-1273.

Finally, in *O'Neill v. Connecticut Light and Power Co.*, 2020 WL 1889124, the electric utility attempted to use its tariff to obtain complete immunity. The cases that CL&P were relying on involved tariffs with limits on tariff-related protection.

In contrast, MGC is relying on its tariff for more narrow purposes: (1) to protect it from claims asserted by a specific class of customers/consumers who use gas from a third party, which MGC cannot and does not control (Mainline Consumers); (2) to protect it from liability for the Carpers' furnace, which was undisputedly malfunctioning and in use when it should have been shut-off and repaired; and (3) to limit causes of action to negligence. The fact that Plaintiffs' negligence claims are factually unsupported does not render MGC's Tariff unreasonable. Tariff limitations on liability are not an outdated concept. While Plaintiffs' Opposition to the Motion for Summary Judgment was pending, the U.S. District Court for the Southern District of California applied a tariff provision to limit claims arising from "Consumer Equipment." *See In re SDG&E*

*Consolidated Cases*, 2021 WL 662259 (S.D. Cal., Feb. 19, 2021). In doing so, the court rejected the plaintiffs’ attempt to bypass the Tariff by citing “common law,” and ultimately granted the utility’s motion for summary judgment.

**5. The tariff provisions at issue do not conflict with “the laws of this state” and the Circuit Court did not actually consider the issue.**

The Order used the phrase “the laws of this state” as a launch pad for analysis that suggests that MGC’s tariff provisions violate West Virginia statutes, regulations, and common law. The Order implicated one statute (W. Va. Code § 24-3-1), two PSC rules (W. Va. Code St. R. §§ 150-4-4.10 and 150-4-7.2.1), and the “common law.” The Order is legally erroneous.

***a) West Virginia Statutes***

West Virginia Code § 24-3-1 provides, in relevant part:

Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference.

The use of the word “reasonable” indicates that public utilities have responsibilities but there are limits on those responsibilities, akin to the concept of negligence. As to gas utilities and operations, the PSC established rules that are codified in W. Va. Code St. R. §§ 150-4-1 *et seq.* See W. Va. Code § 24-1-7. The PSC built the concept of “reasonableness” into those rules, which includes attempts to protect gas utilities from unreasonable demands. Based upon the existence of MGC’s tariff, and others like it, it is obvious that the PSC regards narrow limitations of liability as consistent and wholly reconcilable with this section.

Contrary to what the Circuit Court’s Order suggests, *Reed v. Smith Lumber Co.*, 165 W. Va. 415, 268 S.E.2d 70 (1980), did not hold that W. Va. Code § 24-3-1 transformed public utilities into omnipresent guarantors against harm in *all* situations. Unlike the Plaintiffs’ circumstance,

*Reed* involved a circumstance where the gas utility had notice and knowledge of a problem with the customer's furnace (like *Adams*), but it turned on the customer's gas service anyway. *See id.* at 418, 267 S.E.2d at 71. This Court's discussion focused on that aspect of the gas utility's duty of care. *See id.* at 418–21, 268 S.E.2d at 71-73.

It is clear from our precedents and those of other states that **if a gas company has notice** of defects in gas lines, pipes or customers' appliances, that are dangerous to human health and safety, it has a duty to repair the defects or shut off the gas until repairs are made.

*Id.* at 421, 268 S.E.2d at 72 (citations omitted) (emphasis added). MGC did not have notice about the Carpers' furnace and Plaintiffs' experts agree that the incident would not have occurred if the rollout switches were mounted properly.

#### ***b) Rules and Regulations***

This aspect of the Circuit Court's analysis only relates to the gas quality claims. The Order erroneously concludes that MGC's Tariff's limitations on liability contravene W. Va. Code St. R. §§ 150-4-4.10 and 7.2.1, i.e., "the laws of the state" as MGC understands the analysis. As with the enabling legislation, the Circuit Court deviates from the plain language and substitutes its own view. Paragraph 70<sup>19</sup> of the Order cites W. Va. Code St. R. § 150-4-2.1.4 as a basis for the premise that the PSC cannot carve out areas where a gas utility has no liability. This conclusion requires the Court to ignore the rest of W. Va. Code St. R. § 150-4-2.1, in which the PSC explicitly reserves the right "to protect the utilities from unreasonable demands." This rule provides, in full:

##### **2.1 Authorization of rules.**

2.1.1 These rules are intended to define good operating practices, which can normally be expected.

2.1.2 They are intended to ensure adequate service and to prevent unfair charges to the public, and **to protect the utilities from unreasonable demands.**

2.1.3 The adoption of these rules shall in no way preclude the Public Service Commission from altering or amending them in whole or in part, or from requiring

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<sup>19</sup> There are two ¶70 in this Order, this reference refers to the first such paragraph, which cites W. Va. Code St. R. § 150-4-2.1.4.

any other additional service, equipment, facility, or standard either upon complaint or upon its own motion, or upon the application of any utility.

2.1.4 These rules shall not relieve in any way a utility from any of its duties under the laws of this State.

W. Va. Code St. R. § 151-4-2.1 (emphasis added)

The Circuit Court's premise appears to be that MGC violated W. Va. Code St. R. §§ 150-4-4.10 and 7.2.1, and that it is improper for MGC to use tariff language as a shield for those purported violations. This conclusion is incorrect. "[The rules] are intended to ensure adequate service and prevent unfair charges to the public, **and to protect the utilities from unreasonable demands.**" W. Va. Code St. R. § 150-4-2, 2.1.2 (emphasis added). The Tariff provisions that MGC is relying on provide that kind of protection.

Plaintiffs are attempting to hold MGC liable for the quality of gas that the Carpers obtained from a third-party pipeline company. The Carpers did not use processed, pipeline quality gas. They used gas drawn directly from a transmission/gathering line. Plaintiffs also are attempting to hold MGC liable for the fact that the Carpers had a malfunctioning furnace that was kept in service by intentionally disabling safety shut-off features. Public utilities are not insurers for all accidents that occur at their customers' premises, and the Tariff reflects that fact.

The fallacy of Plaintiffs' suggestion and the Circuit Court's analysis is demonstrated by the notion that MGC violated the PSC's rules. The pertinent rule states:

Change in character of service – In case any substantial change is made by a utility in the composition of the gas, the pressure, or other conditions which would affect the efficiency of operation or adjustment of appliances, the appliances of all customers in the district affected shall be inspected and shall be readjusted, if necessary, by the utility for the new conditions without charge.

W. Va. Code St. R. § 150-4-4.10. The premise of that rule is that a "substantial change is made by a utility in the composition of the gas." *Id.* In this case, MGC did not provide the gas supply in the manner that is contemplated by this rule. It simply metered and sold the gas supplied via the

Carpers' tap on Core Appalachia's pipeline. MGC cannot change the composition of the gas. Additionally, this rule lays out MGC's obligations *if* it makes a change – there is no evidence that MGC made any changes to the gas. The gas at issue flowed from Core Appalachia, into MGC's meter assembly, and then directly into the customer service piping. It never entered MGC's distribution system.<sup>20</sup>

Similarly, Plaintiffs' claim that MGC violated W. Va. Code St. R. § 150-4-7.2.1 places MGC in the position of having to guarantee the gas quality from Core Appalachia's supply as opposed to gas in MGC's distribution system. This rule states:

All natural gas distributed in this State shall be free from dangerous or objectionable quantities of impurities such as hydrogen sulphide, nitrogen or other combustible or noncombustible, noxious, or toxic gases, or other impurities. A gas shall be considered free from undesirable impurities when the quantity of any impurity present is within the limits recognized as allowable in good practice.

W. Va. Code St. R. § 150-4-7.2.1. Again, this rule is based on the premise that the Carpers received processed gas. That is not the case here.

West Virginia has a clearly stated Legislative policy to take advantage of its natural resources and to ensure that natural gas is accessible and affordable for state residents. *See* W. Va. Code, §§ 24-1-1 (2015), 150 (2020). The Circuit Court's Order disregards this policy and substitutes its judgment for that of the PSC. The PSC rules and company-specific tariffs are part of the balancing act required to achieve this goal. Both consumers and the well-being of public utilities are considered. Without farm taps, consumers like the Carpers would not have access to natural gas. Because the Carpers are outside of MGC's distribution system, specific protections

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<sup>20</sup> This is reinforced by the definition of "low pressure distribution system" in W. Va. Code St. R. § 150-4-2.3.9 – "[T]hat portion of the utility's system in which standard distribution pressure is maintained, and from which the gas is introduced from the mains into the customer service or house piping without passing through a pressure regulating device."

for the gas utility are reasonable. To do hold otherwise would constitute an “unreasonable demand” on MGC and other utilities, in contrast with the reasonableness mandate that is discussed herein.

Additionally, the Circuit Court applied each of these sections to the undisputed facts in a manner that belies the language of W. Va. Code St. R. §§ 150-4-4.10 and 150-4-7.2.1. The Carpers did not receive pipeline quality gas. This is not a fact at issue.

c)      *Common Law*

Notwithstanding the Order’s reference to common law, the decision did not articulate what aspect of common law the tariff violated, apart from general negligence. Based on the foregoing discussion of W. Va. Code § 24-3-1 and W. Va. Code St. R. §§ 150-4-4.10 and 150-4-7.2.1, it is evident that the source of common law must be something *other than* these legislative enactments. Even if those enactments can be regarded as a statutory duty, it is clear from this legislative scheme that the duty did not flow to third-party supplied gas or customer equipment.

Focusing on the latter, W. Va. Code St. R. § 150-4-5.4.4 sets forth some of the *customers’* obligations:

**5.4.4. Customer service piping<sup>21</sup> --**

**5.4.4.a. Installation -- The customer, or the customer's designee, shall furnish and install the necessary pipe to make connection from the company service provided by the utility at the property line abutting the utility's main, to the inlet of the meter. The customer service piping shall be installed by the customer in accordance with the utility's safety requirements for such installation.** The utility’s safety requirements are set forth in its tariff as required pursuant to Rule 8.3., *infra*. In the installation of customer service piping, the customer must not install any tees or branch connections. Further, if plastic piping is installed, tracer wire and warning tape for direct burial must be used so that the plastic line may be readily located.

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<sup>21</sup> “The term ‘customer service piping’ shall mean the segment of the piping extending from a point at the property line, right of way or easement line to the inlet of the meter serving the customer, where the meter is not located at the property line, right of way or easement line.” W. Va. Code St. R. § 150-4-2.3.5.

**5.4.4.c. Maintenance** -- The customer service piping is sometimes owned by the customer, and other times owned by the utility. The customer shall not make any change in or interfere with the customer service piping without the utility's approval. **The customer shall keep the customer service piping in good repair, if the customer owns the customer service piping.** Regardless of who owns the customer service piping, the utility shall operate and maintain the customer service piping. For purposes of this rule, operation and maintenance shall include ...

This is consistent with MGC's position that the Carpers were responsible for the safe operation and maintenance of their furnace. Nothing in the common law requires a utility to be its consumers' insurer.

**D. The tariff provisions at issue are reasonable.**

The Circuit Court concluded that MGC's tariff provisions were "unreasonable in light of the requirements of West Virginia law outside of the [PSC's] limited powers as permitted by statute." Order at ¶ 72. Respectfully, the Circuit Court did not analyze reasonableness. It restated its conclusion about the Legislature's delegation of powers. Given the Legislature's broad delegation of authority to the PSC, reasonableness presents a different question. MGC's tariff provisions are reasonable.

Section 2.6 of the tariff limits MGC's liability for the quality of Core Appalachia's gas. The reason is simple – Core Appalachia's gas is piped via a transmission/gathering line, directly from one or more production wells, and MGC does not have any control over the quality. The PSC is aware of, supports, and encourages the use of main line tap gas and that is why MGC and other gas utilities have tariff provisions of this nature. *See* MSJ Ex. N (A. 0285-316). MGC does not own the gas supplied via mainline taps and provides this service in furtherance with West Virginia policy.

Pursuant to § 3.3 of MGC's tariff, MGC cannot be held liable for damages or injuries caused by the condition or character of the consumers' equipment or their use of the gas beyond

the point of delivery (outlet of the meter). This case is an excellent example of why limitations of liability exist. The Carpers had a licensed HVAC technician (Daniel Carper) maintaining the furnace. Despite this, the furnace was tampered with so that it operated unsafely. Even Plaintiffs' experts agree that the incident would not have occurred if the flame rollout switches had not been tampered with. Sections 2.6 and 3.3 provide limitations regarding conditions that are beyond MGC's and other utilities' control.

Section 3.1 of the tariff limits MGC's liability for theories of liability *other than* negligence. This means that causes of action such a strict liability, breach of warranty, breach of contract, failure to warn, and others, are barred. Negligence claims are allowed, subject to the tariff.

These limitations are reasonable given the context in which MGC operates. MGC is a highly regulated public utility that must operate pursuant to PSC rules, regulations, rates, and orders, which includes the aforementioned tariffs. The PSC is vested with looking out for the public's interest and allowing these limited exceptions as part of the exercise of that power. The fact that Plaintiffs' circumstances bars their claims should not bar the application and enforcement of these reasonable limitations.

## **VI. CONCLUSION**

For the reasons stated herein, MGC respectfully requests that this Court issue a writ of prohibition directing the Circuit Court to apply MGC's Tariff, as it is written, to the undisputed facts in this case.

Respectfully submitted by:

**Mountaineer Gas Company,  
*Petitioner,***

By Counsel

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THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA *ex rel.*, MOUNTAINEER GAS COMPANY,

*Petitioner,*

v.

THE HONORABLE R. CRAIG TATTERSON, Judge of the Circuit Court of Roane  
County, West Virginia, THE ESTATE OF CORY COLTON KEITH CARPER, et al.,

*Respondents,*

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*From the Circuit Court of  
Roane County, West Virginia  
Civil Action No. 19-C-9*

**VERIFICATION**

I, Carrie Goodwin Fenwick, counsel for Petitioner, being duly sworn, depose and say that I have reviewed the foregoing *Petition for Writ of Prohibition* and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.



Carrie Goodwin Fenwick (W.Va. Bar. No. 7164)

Taken, subscribed, and sworn to before me this 17th day of August, 2022.

My commission expires: May 5, 2026



  
NOTARY PUBLIC

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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*Respondents,*

-----  
*From the Circuit Court of  
Roane County, West Virginia  
Civil Action No. 19-C-9*

**CERTIFICATE OF SERVICE**

I, Carrie Goodwin Fenwick, do hereby certify that the foregoing “*Petition for Writ of Prohibition*” has been served this 17th day of August, 2022, upon the following by the U.S. Mail, as follows:

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